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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

49ER CHEVROLET and RICHARD E. WILMSHURST,
Appellants,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

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QUESTIONS PRESENTED

I

WOULD THIS COURT'S HOLDING IN *GIBSON v. BERRYHILL*, FINDING SUBSTANTIAL PECUNIARY INTEREST IN A BOARD OF OPTOMETRY BASED UPON A FACTUAL AND SPECIFIC FINDING OF PECUNIARY INTEREST BY THE TRIAL COURT SUPPORT AN APPELLATE COURT'S DECISION THAT EVERY AUTOMOBILE DEALER HAS A SUBSTANTIAL PECUNIARY INTEREST IN ADMINISTRATIVE PROCEEDINGS WHEN ANOTHER AUTOMOBILE DEALER AND AUTOMOBILE MANUFACTURER ARE PARTIES TO A CONFLICT TO BE DECIDED AND THERE ARE NO FACTS PRESENT LINKING A SUBSTANTIAL FINANCIAL INTEREST TO ANY OF THE ADJUDICATING DEALERS?

II

WOULD THE CHALLENGE PROCEDURES IN THE CALIFORNIA ADMINISTRATIVE CODE PROVIDE AN ADEQUATE REMEDY FOR ALL PARTIES TO AN ADMINISTRATIVE HEARING, TO PURGE THE BOARD OF ANY BIAS ADJUDICATORS SO THAT A FAIR HEARING WOULD BE AVAILABLE TO ALL PARTIES AND MEET THE DUE PROCESS REQUIREMENTS OF THE FOURTEETH AMENDMENT?

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Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

JURISDICTIONAL STATEMENT

Petitioners, 49ER Chevrolet and Richard E. Wilmshurst, the named dealer of record ("49ER") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District entered in this proceeding on August 25, 1983 and on which the Supreme Court of the State of California denied Petitioner's petition for hearing by an order made and filed on October 20, 1983. The judgment and opinion rendered in favor of Respondent Chevrolet Motor Division, General Motors Corporation ("Chevrolet") held that a provision of the California Automobile Franchise Act (California Vehicle Code §§ 3000-3069) violated the Due Process Clause of the Fourteenth Amendment. Additional parties to this action are the New Motor

Vehicle Board of the State of California ("Board") and the Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California ("Association"), both of whom seek review of the said judgment, Petitioners are informed and believe both of the additional petitioners are filing Petitions for a Writ of Certiorari in this action with this Court.

OPINION BELOW

The opinion of the Court of Appeal of the State of California is reported as *Chevrolet Motor Division v. New Motor Vehicle Board* (1983) 146 Cal.App.3d 533, 194 Cal. Rpr. 270 and appears in the appendix hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeal of the State of California, First Appellate District was entered on August 25, 1983. The Court of Appeal denied a timely petition for rehearing on September 23, 1983. Thereafter, on October 20, 1983, the Supreme Court of California denied a petition for hearing. This Petition for Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

STATUTORY PROVISIONS INVOLVED

The provisions of the California Automobile Franchise Act that were held to violate the Due Process Clause of the Fourteenth Amendment in the California Court of Appeal opinion are California Vehicle Code §§ 3050 (d) and 3066 (d). Those pertinent sections, as well as portions of California Vehicle Code §§ 3000, 3001, 3003, 3010, 3060 and 3061 are set out verbatim in the Appendix as Exhibit B. (All sections are of the California Vehicle Code unless otherwise indicated)

STATEMENT OF THE CASE

Chevrolet notified 49ER Chevrolet and Richard E. Wilmshurst ("49ER") its franchised dealer in Angels Camp, California that 49ER's existing franchise would not be renewed when it expired. The Wilmshurst family has been the Chevrolet dealer in Angels Camp since 1933. Pursuant to § 3060, 49ER protested Chevrolet's refusal to continue the existing franchise relationship. Under § 3060, Chevrolet could not lawfully refuse to continue 49ER's franchise until 49ER's protest was heard by the Board in accordance with § 3066. At the hearing, Chevrolet was required by § 3066(b) to prove that it possessed good cause for the franchise non-continuance. The Board is directed by § 3061 to consider a number of pertinent facts involving the operation of the dealership involved in the good cause hearing, such as the volume of the dealership's business relative to the business available, amount of the investment by the franchisee and the adequacy of the dealership's sales and service facilities.

Following a hearing, the Board sustained 49ER's protest. Thereafter Chevrolet petitioned the San Francisco Superior Court for a writ of administrative mandamus to vacate the Board's decision. Chevrolet claimed the Board action was improper for many reasons, including the argument the Board had exceeded its jurisdiction in hearing the 49ER protestant and that the Board was not an impartial tribunal because the dealer members of the Board had a substantial pecuniary interest in the proceeding and such a biased tribunal violated Chevrolet's right to due process of law. The Superior Court granted the writ on both of the grounds urged by Chevrolet, the California Court of

Appeal considered only the biased tribunal argument in affirming the trial court judgment.

49ER, the Board and the Association petitioned the Supreme Court of California, in a timely manner, for a hearing on the decision of the Court of Appeal. The California Supreme Court, the highest state court in which a decision could be rendered in this matter, denied the petitions on October 20, 1983, and 49ER now seeks a writ of certiorari from this Court within ninety days following that denial.

In the trial court, Chevrolet specifically alleged in its petition for a writ of mandate that the participation of the dealer members of the Board in the 49ER non-continuance hearing violated Chevrolet's rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Chevrolet based its argument in the Superior Court on the rationale of *American Motors Sales Corp. v. New Motor Vehicle Board*, (1977) 69 Cal.App.3d 983, 138 Cal. Rpr. 594 (Set forth in appendix C), the holding that dealer members of the Board had a substantial pecuniary interest in all protest hearings. The trial court and the Court of Appeal each referred to the Federal Due Process holding in *American Motors*.

Congress preempted the states in the regulation of the relationship between the automobile manufacturer and dealers when the Dealer's Day in Court Act was passed in 1956. (Title 15 U.S.C. 1221 et seq.) The California Automobile Franchise Act, along with acts regulating the dealer-manufacturer relationship in forty-eight other states are authorized by Title 15, U.S.C. 1225.

In an area of interstate commerce, such as the automobile industry, that is regulated by Federal law and where permission is given to the states to implement but not conflict with Federal law, the constitutional standards applicable to State and Federal regulations should be that of the United States Constitution so that the same application will be had throughout the fifty states.

THE QUESTIONS ARE SUBSTANTIAL

THERE MUST BE SPECIFIC FACTS ALLEGED, UPON WHICH A COURT COULD REASONABLY FIND BIAS, BEFORE ONE OR MORE PERSONS ON AN ADMINISTRATIVE BOARD CAN BE DETERMINED TO BE BIAS AND THAT BOARD'S MAKEUP DECLARED UNCONSTITUTIONAL (AND), IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

This Court's opinion is necessary to establish the proper procedure and standard to determine whether bias is present in a class of adjudicators, when one of the parties to the adjudication, challenges the class for bias based upon the allegation of a substantial pecuniary interest.

This Court agreed with the District Court in *Gibson v. Berryhill* (1973) 411 U.S. 564 that the Alabama Board of Optometry, made up of only self-employed optometrists was in a position to and was presently engaged in, attempting to have the licenses of optometrists employed by corporations suspended. If the Alabama Board were successful, then the business done by (corporation) optometrists would become the business of the sole practitioners. Since the (corporation) optometrists amounted to 48% of the

optometrists in Alabama, the pecuniary interest of their lost business would be substantial.

The court below, did not find evidence of bias, Chevrolet's Consolidated Responding Brief, filed in the Court of Appeal, admitted at page 35 that the Board was not biased in this proceeding:

> "But Chevrolet does not contend that the dealer members were biased due to the particular fact of this case; it contends that the dealers are biased in all dealer termination cases and therefore can participate in none of them. Chevrolet therefore directly challenges the statutory scheme which says that dealers 'may' participate in such adjudications and claims they may not."

The record in this proceeding does not contain allegations or evidence of bias, much less any substantial pecuniary bias held by any of the dealer Board members, that would support the decision of the Court of Appeal.

The Court of Appeal decision rests solely on the opinion in *American Motors Sales Corp. v. New Motor Vehicle Bd.*, (1977) 69 Cal.App.3d 983, 138 Cal.Rptr. 594.

The *American Motors* opinion turns on two points, (1) that the legislature took sides by requiring four members of the nine-person Board to be car dealers and (2) (that) dealer Board members have a substantial pecuniary interest in franchise termination cases.

This Court settled the first *American Motors* point in *Friedman v. Rogers* (1979) 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100. This Court held:

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

This Court settled the second *American Motors* point, when it held the California Automobile Franchise Act was related to a legitimate state interest in *New Motor Vehicle Board et al. v. Orrin W. Fox Co. et al.* (1978) 439 U.S. 96, 99 S. Ct. 403, 58 L.Ed.2d 361.

Therefore the decision in *Fox* removes the suggestion that new car dealers are a suspect class per se. In order to find substantial pecuniary interest there must be evidence upon which a court could reasonably determine that the class or individuals of the class had a specific financial interest in the particular proceeding, as this Court found in *Gibson*, supra. Mere speculation and conjecture cannot replace the evidence and specific course of conduct of the Optometry Board found in *Gibson*.

The *American Motors* court speculated as to the dealers prejudice for dealers and the respondent speculated as to the dealers prejudice for the manufacturer. The court and the respondent are both correct; the member or members

of any group, suspect or not could be bias in a particular situation.

However, to reverse a decision of a Board based upon the Due Process Clause there must be evidence of an actual *substantial* pecuniary bias as this Court found in *Gibson*, supra.

There is no evidence in the *49ER* record or the *American Motors* decision that the Board with dealer members participating have been biased against automobile manufacturers. However, in the *Fox* case supra, this Court at footnote 14 notes:

> ". . . 117 protests have been filed under § 3062 since the Act became effective (July 1, 1974). Of these, only 42 have gone to hearing on the merits, and only one has been sustained by the Board . . . "

Mr. Justice Stevens, dissenting, at page 121 places these results in another perspective:

> ". . . it [the statute] places the burden of demonstrating that there is good cause *not* to permit the new opening to take place on the objecting dealer. If the scales are evenly balanced, the presumption will prevail.
>
> The California Board's actual administration of the statute confirms this analysis. Of the first 117 protests filed under the law, only 1 was sustained by the Board. In other words, over 99% of the contested new dealerships or relocations were found to be consistent with the policy of the statute."

The speculation and conjecture that dealer members of the Board would slant decisions toward the dealers' inter-

est expressed in *American Motors* becomes totally unfounded when compared with the facts found in *Fox*.

After reviewing the performance of the Board this Court found at page 107-108:

> "Further, the California Legislature had the authority to protect the conflicting rights of the motor vehicle franchisees through customary and reasonable procedural safeguards, i.e., by providing existing dealers with notice and an opportunity to be heard by *an impartial tribunal—the New Motor Vehicle Board*—before their franchisor is permitted to inflict upon them grievous loss. *Such procedural safeguards cannot be said to deprive the franchisor of due process.*" (emphasis added)

This Court's decision in *Fox* overrules the *American Motors* case that preceded *Fox* by a year. There (is) no evidence of bias within the dealer Board members or a showing of a high percentage of protests decided against the manufacturers upon which this Court might change its previous decision.

American Motors was overruled by *Fox* and any decision based upon the due process holding in *American Motors* must be reversed.

THE CHALLENGE PROCEDURE IN THE CALIFORNIA ADMINISTRATIVE CODE PROVIDES AN ADEQUATE REMEDY FOR ALL PARTIES TO AN ADMINISTRATIVE HEARING TO PURGE THE BOARD OF ANY BIAS ADJUDICATORS SO THAT A FAIR HEARING WOULD BE AVAILABLE TO ALL PARTIES AND MEET THE DUE PROCESS STANDARDS OF THE FOURTEENTH AMENDMENT

The California Administrative Code, Title 13, Section 551.1 ("551.1 or challenge") provides an adequate remedy for the parties to a dispute before the Board to have the issue of Board member bias determined prior to the hearing taking place.

> "551.1 *Challenge*
> A hearing officer or board member shall voluntarily disqualify himself and withdraw from any hearing or deliberation in which he cannot accord a fair and impartial hearing or consideration. *Any party may request the disqualification of any hearing officer or board member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which is claimed that a fair and impartial hearing cannot be accorded.* Where the request concerns a board member, the issue shall be determined by the other members of the board. Where the request concerns the hearing officer, the issue shall be determined by the board, if the board itself hears the case with the hearing officer, otherwise the issue shall be determined by the hearing officer." (emphasis added)

The Challenge procedure not only gives either party the opportunity to purge the Board of any bias members, but if the challenge is not upheld, there is evidence of the par-

ticular grounds in the challenging parties affidavit, for review on appeal to the Superior Court.[1]

As quoted from Chevrolet's Court of Appeal Brief, supra, Chevrolet did not contend that the dealer members of the Board were biased due to the facts of this case, however, the dealer Board members were alleged to be somehow bias in all dealer termination cases.

If Chevrolet believed this to be true, prior to the hearing taking place Chevrolet should have challenged each dealer member for bias by affidavit establishing the specific grounds. *Chevrolet chose to waive this administrative remedy.*

If Chevrolet had challenged the dealer members of the Board and the four members had recused, the Board was still functional, as only three members of the Board are necessary for a quorum in § 3060 or § 3062 hearings. (See § 3010)

It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, (1938) 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-64, 82 L.Ed. 638.

When *American Motors*, supra, was decided by the Board in 1974, the Challenge procedure (551.1) was not in effect. (§ 551.1 became effective on January 28, 1976) Although *Lehnhausen*, supra, was the law with regard to board member classification, the case was neither mentioned or distinguished in *American Motors*.

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[1] §3068 provides that either party may seek judicial review from a final decision of the Board within 45 days.

An excellent discussion of the purpose of exhausting administrative remedies is present in *Republic Industries v. Central Pa. Teamsters* (1982) 693 F.2d 290 and applies to this proceeding.

Chevrolet waived its right to have this case decided on Due Process grounds when it failed to follow the Challenge procedure available to it in the administrative process. The *Republic* court found:

> ". . . fact-finding functions may be particularly important in the resolution of cases involving constitutional issues." (P-293)

If there were merit to Chevrolet's allegation of bias among the dealer Board members, the Challenge procedure would have provided evidence, upon which the Board could have acted, prior to the hearing, purging the Board of bias members and provided a fair hearing. On the other hand, if the Board did not act upon the evidence of bias provided by Chevrolet, on review, a lower court could have ordered a re-hearing before an unbias Board.

The reason for requiring the exhaustion of administrative remedies is directly in point here as the *Republic* court stated:

> ". . . even if the court must reach the constitutional issues, the administrative tribunal will have developed the factual matrix so vital to constitutional decision-making. *Hodel v. Virginia Surface Mining & Reclamation, Association*, 452 U.S. 264, 295-97, 101 S.Ct. 2352, 2370-71, 69 L.Ed.2d 1 (1981)" (P-293)

Over the years, administrative agencies, through the direction of the courts, have promulgated procedures that provide for fair and prompt adjudication of disputes. The

failure of a corporation, with the legal expertise of General Motors, to follow the procedure available to purge the Board of believed bias and thereafter participate in the hearing process as the legislature intended is inexcusable.

This proceeding should be remanded to the court below to be decided on grounds other than due process; Chevrolet waived its right to review of the constitutional makeup of the Board by failing to exhaust its administrative remedies.

CONCLUSION

The standard of review for alleged pecuniary bias and the duty of the party making the allegation to provide the court with a meaningful record of the alleged bias in an administrative adjudication are substantial questions which require this Court's attention.

Dated: January 18, 1984

Respectfully submitted,

RICHARD E. WILMSHURST per se
49ER CHEVROLET

Appendix A

In the Court of Appeal
of the
State of California

First Appellate District

Division Three

A015529
(Super. Ct. No. 777974)

Chevrolet Motor Division, General Motors Corporation,
Plaintiff and Respondent,

v.

New Motor Vehicle Board, Defendant and Appellant;
49er Chevrolet, Real Party in Interest and Appellant;
Northern California Motor Car Dealers Association, Inc.,
et al., Interveners and Appellants.

[Filed August 25, 1983]

This appeal is from a judgment granting a peremptory writ of mandamus, ordering that a decision of the state's New Motor Vehicle Board (the Board) be set aside. Appellants are the Board, real party in interest 49er Chevrolet (49er), and two associations of car dealers, Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers of Southern California, Inc. (Associations), who were granted leave to intervene below. Respondent is Chevrolet Motor Division, General Motors Corporation (Chevrolet).

I

The relevant facts are as follows. Chevrolet notified 49er, its dealer in Angels Camp, that when their existing franchise agreement expired on October 31, 1980, a new agreement would not be offered. 49er protested to the Board pursuant to Vehicle Code section 3060,[1] which provides in pertinent part that "no franchisor shall terminate or refuse to continue any existing franchise" for the marketing of new motor vehicles "unless" the Board "finds . . . good cause for termination or refusal to continue" the franchise. The Board consists of nine members, four of whom are required to be new motor vehicle dealers. (§§ 3000, 3001.) At a hearing on a dealer-manufacturer dispute, the dealer members of the Board may participate, hear, and comment or advise other members, but they may not "decide" the matter. (§§ 3050, subd. (d), 3066, subd. (d).)

After a hearing, the Board sustained 49er's protest. Chevrolet then filed this action, seeking to require the Board to vacate its decision. The trial court granted the petition for writ of mandate on two grounds: (1) participation of dealer board members in the deliberative process, without participation of manufacturers, deprived the manufacturers of an impartial tribunal, violating due process; and (2) the Board was without jurisdiction to hear 49er's protest as the manufacturer neither "terminat[ed] [n]or refus[ed] to continue any existing franchise" within the meaning of section 3060. This appeal followed.

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[1]Unless otherwise indicated, all statutory references are to the Vehicle Code.

II

When the Board was originally established in 1967 as the New Car Dealers Policy and Appeals Board, it functioned much as do other state occupational licensing boards. Among its duties, for example, was the hearing of appeals by licensed dealers from decisions of the Department of Motor Vehicles. (See Stats. 1967, ch. 1397, § 2, p. 3261 et seq.; see *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986.) Four of the Board's nine members were required to be "new car dealers." (Stats. 1967, ch. 1397, § 2, pp. 3261-3262.)

In 1973 the Legislature renamed the Board the New Motor Vehicle Board, and added sections 3060 to 3069, which established a series of procedures for the adjudication of disputes between dealers and new car manufacturers. (Stats. 1973, ch. 996, § 16, p. 1967-1971.) Among other duties, the Board was empowered to determine whether there is "good cause" to terminate or refuse to continue a franchise. (§ 3060.) The requirement that four of the Board's members be new car dealers was not changed.

In *American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal.App.3d 983, a dealer-franchisee protested a noticed termination to the Board, which found that good cause had *not* been shown. (*Id.*, at p. 985.) As in the present case, the franchisor challenged the Board's decision by petitioning the superior court for relief in administrative mandamus. The superior court granted relief, concluding that sections 3060 and 3066 of the Act violated due process "'because four of the nine members of the

Board are . . . new car dealers, who may reasonably be expected to be antagonistic to franchisors . . . .'" (*Ibid.*)

In a 2-1 decision, the Court of Appeal affirmed, and the Supreme Court denied a petition for hearing. After taking note of "a long history of legal warfare between the automobile manufacturers and their dealers" (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal. App.3d at p. 986), the court found it "unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a Board member, depends entirely upon the Board's interpretation of 'good cause.' It is to every dealer's advantage not to permit termination for low sales performance, which fact however is to every manufacturer's disadvantage." (*Id.*, at p. 987.)

The court acknowledged that in some instances a dealer Board member might be more financially interested in ruling in favor of the manufacturer, i.e., where the franchise of a competitor was being terminated, or where the dealer wished to ingratiate itself with its own manufacturer. The court viewed this not as fairness, but as an equalizing unfairness. "Either way, the objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal.App.3d at pp. 987-988.)

The court distinguished cases holding that a licensing or regulatory agency may constitutionally be composed in

whole or in part of members of the business regulated, on the ground that the members of this Board were no longer merely regulating members of their own occupation. Instead, they were regulating the economic and contractual relations of others with members of their own occupation, but ". . . car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal.App.3d at pp. 990-991.)

The court then stated that the Legislature's "requirement that the nine-man Board consist of at least four car dealers" meant that "[i]n effect it [the Legislature] took sides in all Board-adjudicated controversies between dealers and manufacturers, making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body. This legislative partisanship damns the Board." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal.App.3d at p. 991.) "[T]he objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*Id.*, at pp. 987-988.) "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases [citation], their *mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." (*Id.*, at p. 992, original emphasis, fn. omitted.)

The court concluded as follows: "What we hold is that the combination of (1) the mandated dealer-Board mem-

bers, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 992; cf. *General Motors Corp. v. Capitol Chevrolet* (Tenn. 1983) 645 S.W.2d 230; *Ford Motor Company v. Pace* (1960) 206 Tenn. 559 [335 S.W.2d 360]; *Gen. GMC Trucks v. Gen. Motors Corp.* (1977) 239 Ga. 373 [237 S.E.2d 194].)

In reaction to the *American Motors Sales Corp.* decision, the Legislature amended Section 3050, subdivision (d), and added subdivision (d) to section 3066 to provide that no member of the Board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a dispute between manufacturer and dealer. (See Stats. 1977, ch. 278, §§ 2-3, pp. 1171-1173; *Chrysler Corp. v. New Motor Vehicle Bd.* (1979) 89 Cal.App.3d 1034, 1037.) However, in a 1979 enactment which took effect as urgency legislation, the Legislature again amended the statutes, this time providing that dealer members of the Board "may participate in, hear, and comment or advise other members upon, but may not decide," any matter involving a dealer-manufacturer dispute. (§§ 3050, subd. (d), 3066, subd. (d); Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) According to the Legislature's declaration of urgency, the amendment was necessary "[i]n order that the educated and needed advice of New Motor

Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board. . . ." (Stats. 1979, ch. 340, § 3, p. 1207.)

The trial court in this case concluded that the amendments to sections 3050 and 3066 did not "cure the unconstitutionality of the earlier provisions of the statute. . . ." The court reasoned that although dealer-Board members no longer have the right to vote, they have the opportunity fully to participate otherwise in the adjudicatory process, whereas the manufacturers are still left unrepresented.

First, appellants 49er and the Board argue that Chevrolet was not entitled to raise this constitutional question for the first time in the trial court. The general rule is that an issue not raised at an administrative tribunal may not be raised in subsequent judicial proceedings. (See, e.g., *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020.) However, a litigant who seeks to challenge the constitutionality of the statute under which an agency operates need not raise that issue in proceedings before the agency as a condition of raising the issue in the courts. (See *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251; *Chrysler Corp. v. New Motor Vehicle Bd., supra,* 89 Cal.App.3d at pp. 1038-1039.)

Here Chevrolet was seeking a declaration that the statutes prescribing the Board's membership were unconstitutional. The Board itself could not have granted this relief because the Constitution expressly provides that an "administrative agency . . . has no power . . . [t]o declare

a statute unconstitutional. . . ." (Cal. Const., art. III, § 3.5.) There was no waiver of Chevrolet's right to raise the constitutional issue in the trial court in these circumstances.

The Board and 49er also argue that Chevrolet should have requested that the dealer members "recuse" themselves from participating. The dealer members of the Board constituted almost half of its total membership (see §§ 3000-3001), and as members they were authorized to participate in franchise disputes. (See § 3050, subd. (d).) If this argument were accepted, predictably automatic requests for the recusal of dealer members would have the effect of routinely depriving the Board of participation by a substantial number of its members in situations involving one of its basic functions. Clearly their recusal was not intended by the Legislature.

Next, appellants contend that *American Motors* is now of questionable validity, in light of *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781. In that case, the Supreme Court held that an administrative law officer with expressed or "crystallized" political or legal views cannot be disqualified on that basis alone, even if those views result in an appearance of bias. (*Id.*, at pp. 791, 793-794.) Appellants reason that the group antagonism and economic conflict between dealers and manufacturers mean that car dealer Board members at most may have "crystallized views" about policy issues in adjudications between manufacturers and dealers. After *Andrews*, appellants urge, absent proof of actual bias, such views are not enough to support a holding that an adjudicator cannot provide a fair tribunal.

However, the *American Motors* court did not find the dealer Board members partial because of their views on issues of law or policy; rather, that court squarely held that those Board members had an "economic stake" in every franchise termination case which came before them. The *Andrews* court itself acknowledged that no proof of actual bias is required for disqualification when a judicial officer has a financial interest in a case. (*Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d at p. 793, fn. 5.)

Appellants then argue that the Board is not a biased tribunal and its action in this case did not deny Chevrolet due process because none of the "adjudicator members" of the Board were biased. Appellants emphasize that there is no contention made that any factor exists which could lead a court to find that the five public members of the Board were or are biased. According to appellants, the dealer members' participation in these proceedings was solely to provide expert advice, a function analogous to that provided to other boards or commissions by agency staff members or assistants. (See, e.g., *Porter County Chapter v. Nuclear Reg. Com'n* (D.C. Cir. 1979) 606 F.2d 1363, 1370-1372.)

We are not persuaded by appellants' attempts to minimize the dealer Board members' role in these proceedings. Unlike agency staff, the dealer Board members have a financial stake in every dealer-manufacturer dispute which comes before the Board. (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 987.) Nevertheless, they are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members

in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that process. The Board has numerous powers and duties other than hearing protests by dealers, and the dealer Board members' participation in those other tasks is unrestricted. (See § 3050.) Because of their ongoing working relationship, public members of the Board may be influenced by arguments or facts suggested by the dealer members but not included in the public record, and the parties themselves may not have the opportunity to respond.

In short, the presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically "decide" the dispute does not alter that probability. Each of the factors enumerated in *American Motors* is still present. The Board is still required by statute to have four dealer members. (See § 3001.) The statute neither requires nor authorizes manufacturer members. (See *ibid.*) The nature of the adversaries and the controversies between them remains the same. These problems have not been remedied by the subsequent changes in sections 3050 and 3066. Accordingly, the trial court did not err when it concluded that participation of the Board's dealer members in these proceedings denied Chevrolet an unbiased tribunal.

In light of our conclusion, we need not consider appellants' contention that the court also erred when it concluded

that Chevrolet did not terminate or refuse to continue the franchise within the meaning of section 3060.

Judgment is affirmed.

CERTIFIED FOR PUBLICATION

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Scott, J.

We concur:

_____

White, P.J.

_____

Feinberg, J.

Appendix B

California Vehicle Code Sections

* * *

§ 3000. *Board Created*

There is in the Department of Motor Vehicles a New Motor Vehicle Board, which consists of nine members.

§ 3001. Qualifications of board members

Four of the appointive members of the board shall be new motor vehicle dealers as defined in Section 426 who have engaged for a period of not less than five years preceding their appointment in activities regulated by Article 1 (commencing with Section 11700) of Chapter 4 of Division 5. These members shall be appointed by the Governor.

Each of the five remaining appointive members shall be a public member who is not a licentiate under Article 1 * * * of Chapter 4 of Division 5 or an employee of such licentiate at the time of such appointment and one of these five appointive members shall have been admitted to practice law in the state for at least 10 years immediately preceding his appointment. One public member shall be appointed by the Senate Rules Committee, one by the Speaker of the Assembly, and three by the Governor.

Each member shall be of good moral character.

* * *

§ 3003. *Terms of office*

Each appointive member of the board shall be appointed for a term of four years and shall hold office until the appointment and qualification of his successor or until six months shall have elapsed since the expiration of the term for which he was appointed, whichever first occurs.

* * *

§ 3010. *Quorum*

Five members of the board shall constitute a quorum for the transaction of business, for the performance of any duty or the exercise of any power or authority of the board, except that three members of the board, who are not new motor vehicle dealers, shall constitute a quorum for the purposes of Article 4 (commencing with Section 3060) of this chapter.

§ 3050. *Duties*

The board shall do all of the following:

• • •

(d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060).

§ 3060. *Termination of Franchise*

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service

obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

§ 3061. *Good Cause*

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the fanchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the

needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

* * *

§ 3066. *Hearings on Protests*

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to this article. Dealer participation shall be recorded in the minutes of the meeting.

Appendix C

Civ. No. 15971. Third Dist. May 23, 1977
American Motors Sales Corporation,
Plaintiff and Respondent,

v.

New Motor Vehicle Board of the State of California,
Defendant and Appellant;
Ken Collins,
Real Party in Interest.

OPINION

PARAS, J.—On April 24, 1974, American Motors Sales Corporation (hereinafter "American Motors") notified its South Lake Tahoe dealer, Ken Collins, that it would terminat his Jeep franchise in 90 days for "failure to develop a sufficient sales volume . . . ." On July 26, 1974, Collins filed a protest with the New Motor Vehicle Board of the State of California (hereinafter "Board") under Vehicle Code section 3060.[1]

A hearing was held under section 3066, and the hearing officer's proposed decision found "good cause" for termination, (§ 3060, subd. (b)). But the Board rejected the proposed decision, took additional testimony from the zone manager of American Motors and from Collins, and concluded that the termination was without good cause. American Motors then successfully sought a writ of mandate from the superior court. The trial judge ruled that sections

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[1]Unless otherwise noted, all section references are to the California Vehicle Code.

3060 and 3066 are violative of due process of law under article I, section 7 of the California Constitution and section 1 of the Fourteenth Amendment to the United States Constitution, "because four of the nine members of the Board are, by statute, (Vehicle Code section 3001), new car dealers, who may reasonably be expected to be antagonistic to franchisors such as American Motors."

The Board appeals, and is supported in this court by the Northern California Motor Car Dealers Association and the Motor Car Dealers Association of Southern California, amici curiae.

There is a long history of legal warfare between the automobile manufacturers and their dealers, ranging from the "military discipline" of the Ford Motor Company in the 1920's to litigation under the 1956 federal "Dealers Day in Court Act," (15 U.S.C. §§ 1221-1225).[2] The act provides in part that "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States . . . and shall recover . . . damages . . . by reason of the failure of said automobile manufacturer . . . to act in *good faith* . . . in terminating, cancelling, or not renewing the franchise with said dealer." (15 U.S.C. § 1222.) (Italics added.) The act does not however preempt state laws (15 U.S.C. § 1225).

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[2]An excellent review of this history, from both a legal and sociological perspective, is in Macaulay, Stewart, Law and the Balance of Power: The Automobile Manufacturers and their Dealers (New York: Russell Sage Foundation, 1966).

The Board (originally called the "New Car Dealers Policy and Appeals Board") was established in 1967 to hear appeals of new car dealers regarding licensing by the Department of Motor Vehicles. (§§ 3000, 3050.) Its duties at that time[3] were substantially the same as those of many other state occupational licensing boards; and as with other boards,[4] the Legislature mandated that certain of the Board members (four of the nine) be new car dealers (§ 3001). In 1973, the Legislature renamed the Board the "New Motor Vehicle Board," and added sections 3060 to 3069 which became operative July 1, 1974. These statutes established a series of procedures for the adjudication of disputes between two distinct classes of litigants, new car dealers and new car manufacturers. They empower the Board to resolve controversies relating to: (1) whether there is "good cause" to terminate or to refuse to continue a franchise (§ 3060); (2) whether there is "good cause" not to establish or relocate a motor vehicle dealership in

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[3]Originally the Board's functions were:

1. To prescribe rules and regulations relating to the licensing of new car dealers;

2. To hear and consider, within certain limitations, an appeal by an applicant for or the holder of a license as a new car dealer from an action or decision by the Department of Motor Vehicles; and

3. To consider any other matter concerning the activities or practices of applicants for or holders of licenses as new car dealers. (§ 3050.)

[4]In its opening brief the Board lists 21 instances of other occupational licensing boards a majority of whose members must be licensees. Examples are the Board of Governors of the State Bar (15 of 21, Bus. & Prof. Code, §§ 6013, 6013.5). State Board of Cosmetology (3 of 5, Bus. & Prof. Code, § 7301), State Board of Accountancy (6 of 8, Bus. & Prof. Code, § 5000), and Board of Dental Examiners (7 of 8, Bus. & Prof. Code, § 1601).

a "relevant market area" (§ 3062); (3) delivery and preparation obligations (§ 3064); and (4) warranty reimbursement (§ 3065).

The result is that although under the 1973 legislation the adversaries before the Board invariably derive from two distinct groups, dealers and manufacturers, the Board which resolves their disputes *must* include four members from the dealer group but *need not* include any members from the manufacturer group. Does an administrative tribunal so constituted meet the requirements of due process? Is it such "a competent *and impartial* tribunal in administrative hearings" (*Peters v. Kiff* (1972) 407 U.S. 493 [33 L.Ed.2d 83, 92 S.Ct. 2163]) as to comport with due process? We agree with the trial judge's negative answer to these questions.

II

The conclusion is unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a Board member, depends entirely upon the Board's interpretation of "good cause." It is to every dealer's advantage not to permit termination for low sales performance, which fact however is to every manufacturer's disadvantage. As Professor Macauley puts it: "For example, a Ford dealer might be able to make a hundred dollar profit on the sale of one car or a ten dollar profit on each sale of ten cars. The immediate result of either strategy is the same for the dealer, but clearly the impact on the Ford Motor Company differs greatly, because in one case it sells only one car while in the other it sells ten. And even if our hypothetical Ford dealer sells ten cars at only a ten dollar

profit on each one, he has no reason to care whether he sells Mustang sport cars, Falcon station wagons, or Thunderbirds. Yet the Ford Motor Company does. It must sell many units of all of the various models it makes, and it must sell its less popular models to recover its tooling costs on them."[3]

Amici curiae respond to this financial interest by pointing to instances in which a dealership-board-member may be more financially interested in ruling in favor of the manufacturer; this would occur, for example, where the franchise of a dealer-member's direct competitor is being terminated, or where the member may wish to ingratiate himself with his own manufacturer. We do not view this a fairness, but rather as an equalizing unfairness. Either way, the objectionable feature of dealer-memberhip on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members.

The landmark case on due process limitations upon such pecuniary conflicts of interest is *Tumey v. Ohio* (1927) 273 U.S. 510 [71 L.Ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243]. There a mayor-judge, in addition to his regular salary, was paid a certain sum per case in liquor law violation cases in which he found the defendant guilty. The United States Supreme Court found this a denial of due process, saying: "The mayor received for his fees and costs in the present case $12, and from such costs under the prohibition act for seven months he made about $100 a month, in addition

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[3]Macaulay, Stewart, Law and the Balance of Power: The Automobile Manufacturers and their Dealers (New York: Russell Sage Foundation, 1966) page 8.

to his salary. We can not regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weight against his acquittal.

". . . There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. *Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.*" Italics added.) (273 U.S. at pp. 531-532 [71 L.Ed. at p. 758].)

The *Tumey* doctrine has been extended recently. In *Ward v. Village of Monroeville* (1972) 409 U.S. 57 [34 L.Ed.2d 267, 93 S.Ct. 80], the mayor-judge had no direct pecuniary interest in convicting the accused, but the fines he levied constituted somewhere between 40 and 50 percent of the village revenues. Again finding a violation of due process, the Supreme Court stated (409 U.S. at p. 60 [34 L.Ed.2d at p. 270]) that the mayor-judge's interest as chief executive officer of the village, responsible to account for village finances to the counsel, presented a "possible temptation" by which "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level

of contribution from the mayor's court."[8] (See also *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 [137 Cal.Rptr. 476, 561 P.2d 1164].)

While the foregoing cases involved due process in a criminal law context, *Gibson v. Berryhill* (1973) 411 U.S. 564 [36 L.Ed.2d 488, 93 S.Ct. 1689], is more directly in point. The issue there was whether the Alabama Board of Optometry was a fair tribunal to determine that it did or did not constitute "unprofessional conduct" for an optometrist to practice in Alabama as a salaried employee of a business corporation. The Board of Optometry consisted exclusively of privately practicing optometrists and included none who were either salaried or employed by business corporations. Only privately practicing optometrists were eligible to become members of the Alabama Optometric Association, and by statute only such members could sit on the Board of Optometry. The Association filed charges of unprofessional conduct with the Board of Optometry against nine optometrists who were employed on a salaried basis by Lee Optical Co., a business corporation. Upon the lodging of the charges, the Board of Optometry defered hearing thereon and filed its own lawsuit in an Alabama state court against Lee Optical Co. and its optometrist-employees, charging them with "unlawful practice of optometry." After prevailing in the trial court, the Board of Optometry then undertook to hear and decide the Association's charges. Lee Optical Co.'s optometrists then sued in federal district court under the Civil Rights Act of 1871 (42 U.S.C. § 1983) and obtained an injunction.

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[8]See Note *The "Right" to a Neutral and Competent Judge in Ohio's Mayor's Courts* (1975) 36 Ohio St.L.J. 889.

Affirming the district court's decision, the Supreme Court ruled that the Board of Optometry was not a fair tribunal for the determination of the "unprofessional conduct" charges. It stated: "First [the district court determined that], the Board had filed a complaint in state court alleging that appellees had aided and abetted Lee Optical Co. in the unlawful practice of optometry and also that they had engaged in other forms of 'unprofessional conduct' which, if proved, would justify revocation of their licenses. These charges were substantially similar to those pending against appellees before the Board and concerning which the Board had noticed hearings following its successful prosecution of Lee Optical in the state trial court.

"Secondly, the District Court determined that the aim of the Board was to revoke the licenses of all optometrists in the State who were employed by business corporations such as Lee Optical, and that these optometrists accounted for nearly half of all the optometrists practicing in Alabama. Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed against the appellees." (411 U.S. at p. 578 [36 L.Ed.2d at pp. 499-500].)

". . . Arguably, the District Court was right on both scores, but we need reach, and *we affirm, only on the latter ground of possible personal interest.*

"It is sufficiently clear from our cases that *those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. Tumey* v. *Ohio*, 273 U.S. 510 (1927). And *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in Tumey. It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.' K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited." (Italics added.) (411 U.S. at pp. 578-579 [36 L.Ed. 2d at pp. 499-500].)

In *Withrow* v. *Larkin* (1975) 421 U.S. 35, 47 [43 L.Ed.2d 712, 723, 95 S.Ct. 1456], the United States Supreme Court additionally notes: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" (See also *In re Murchison* (1955) 349 U.S. 133, 136 [99 L.Ed. 942, 946, 75 S.Ct. 623].)

The Board erroneously equates the issue before us with that involved in cases which hold that a licensing or regulatory agency may constitutionally be composed in whole or in part of members of the business or profession regulated. (*Ex Parte McManus* (1907) 151 Cal. 331 [90 P. 702]; *Rite Aid Corp.* v. *Bd. of Pharmacy of the State of N.J.* (D.N.J. 1976) 421 F.Supp. 1161; *Hortonville Dist.* v. *Hortonville Ed. Assn.* (1976) 426 U.S. 482 [49 L.Ed.2d 1, 96 S.Ct. —].) We have no quarrel with such holdings. Indeed who can better judge the qualifications to practice of a doctor of medicine (as one example), or his adherence to ethical standards of the medical profession, than other

doctors of medicine? Whatever incidental economic benefit doctors may gain by disciplining other doctors is not of constitutional proportion; their training, technical knowledge, and experience give them the necessary expertise to make such judgments, while prima facie these are lacking in lay persons.

Accordingly, given its functions prior to the 1973 legislation, the Board was legally constituted. But as noted, matters were then substantially altered. No longer did the Board solely sit in judgment upon new car dealers in such matters as eligibility and qualification for a license, regulation of practices, discipline for rule violations, and the like. It was given the added power to intrude upon the contractual rights and obligations of dealers and their product suppliers, entities whose respective economic interests are in no way identical or coextensive, frequently not even harmonious. No longer did members of a trade or occupation (dealer-Board-members) regulate only their own kind; they began to regulate the economic and contractual relations of others with their own kind. The considerations which support and dictate the rule of *Ex Parte McManus* no longer prevail, for car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers.

Despite this reality, the Legislature retained the requirement that the nine-man Board consist of at least four car dealers. In effect it took sides in all Board-adjudicated controversies between dealers and manufacturers, making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body. This legislative partisanship damns the Board. (2)

The State may not establish an adjudicatory tribunal so constituted as to slant its judicial attitude in favor of one class of litigants over another. (1b) By doing so in this instance, the Legislature violated its obligation to assure evenhandedness in the adjudicatory process.

The *Tumey*, *Ward*, and *Berryhill* cases above cited differ from the present case in one substantial particular. There the entire adjudicatory body (a single judge in *Tumey* and *Ward* and all the board members in *Berryhill*) was infected by pecuniary interest, while here a minority of the full Board is so infected. Thus we do not read those cases as authority for a rule that every multiple-person administrative agency or board *ipse dixit* runs afoul of due process whenever one or more of its members is possessed of the condemned pecuniary interest. Nonetheless they serve as a springboard for our holding that in the context of this case there has been a denial of due process of law.

The Board argues that antagonism or bias of a judge toward a class (rather than toward an individual litigant) is not constitutionally disqualifying (*N.L.R.B. v. Dennison Manufacturing Company* (1st Cir. 1969) 419 F.2d 1080, 1085; *Tele-Trip Company v. N.L.R.B.* (4th Cir. 1965) 340 F.2d 575, 581), and that a disqualifying bias may not be inferred from the mere circumstance of the adjudicator's private life, i.e., "the bare circumstance that four Board members are new car dealers." (*Parker Precision Products Co. v. Metropolitan Life Ins. Co.* (3d Cir. 1969) 407 F.2d 1070, 1077-1078; *Commonwealth of Pa. v. Local U. 542, Int. U. Of Op. Eng.* (E.D.Pa. 1974) 388 F.Supp. 155, 159; *Central Sav. Bank of Oakland v. Lake* (1927) 201 Cal. 438

[257 P. 521]; *McKay v. Superior Court* (1950) 98 Cal. App.2d 770 [220 P.2d 945].) As we elsewhere more specifically point out however, we do not rest our holding upon simple status. Because the challenged Board members have a "substantial pecuniary interest" in franchise termination cases (cf. *Gibson v. Berryhill, supra*), their *mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process.[7]

For any who might yet have difficulty comprehending the reason why the guaranteed minimum of four car dealers on the Board is both unfair and unconstitutional, the American Motors' brief offers one final telling argument. If the Legislature in 1973 had deleted the requirement that car dealers sit on the Board and had made it mandatory that four officers of car manufacturer corporations sit thereon, would the car dealers have found this acceptable? Of course not.

In summary, we do not hold, as might be argued by the Board, that car dealers are biased solely because they are members of the dealer-class of litigants and are thus per se constitutionally ineligible to sit on the Board. What we

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[7]A seemingly contrary holding in *Ford Motor Company v. Pace* (1960) 206 Tenn. 559 [335 S.W.2d 360], appeal dismissed (1960) 364 U.S. 444 [5 L.Ed.2d 192, 81 S.Ct. 235] rehearing denied (1961) 364 U.S. 939 [5 L.Ed.2d 371, 81 S.Ct. 377], does not impress us. The Tennessee court did not address the specific issue directly but disposed of it under the doctrine that generally a licensing and regulatory agency may constitutionally be composed of members of the business or profession regulated. (335 S.W.2d at p. 367; cf. *Ex Parte McManus* (1907) 151 Cal. 331 [90 P. 702].) We do not find it persuasive.

hold is that the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal.

III

We next consider what is in effect a harmless error argument. Because a majority of the Board (the five remaining members) is composed of disinterested persons, amici curiae argue that the Board as a whole must be considered impartial, citing a number of cases dealing with delegation of legislative power *to fix prices and make rules.* (*State Board v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436 [254 P.2d 29]; *Allen v. California Board of Barber Exainers* (1972) 25 Cal.App.3d 1014 [102 Cal.Rptr. 368, 54 A.L.R.3d 910]; *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1 [97 Cal.Rptr. 431].) Since we are not concerned with the right to an impartial lawmaker but with an undisputed right to an impartial adjudicator, the cases cited do not apply.

The argument in any case has no merit. We reiterate that a new car dealer as such is not per se biased to a degree that he cannot or should not under any circumstances serve on the Board. (3) Simple presence of a biased member does not deprive a board of jurisdiction in a particular case. (*Winning v. Board of Dental Examiners* (1931) 114 Cal. App. 658 [300 P. 866]; *Dyment v. Board of Medical Examiners* (1928) 93 Cal.App. 65 [268 P. 1073]; *Butler v. Scholefield* (1921) 54 Cal.App. 217 [201 P. 625].) The evil here

lies in the state's insistence that under all circumstances the adjudicatory deck of cards be stacked in favor of car dealers. That evil is not eliminated by stacking the deck 4/9ths of the way rather than all the way.

Insofar as the Board is given the power to adjudicate disputes between dealers and manufacturers, it is invalidly constituted. Its decision herein is a nullity reached in violation of due process.

The judgment is affirmed.

Friedman, Acting P. J., concurred.

REGAN, J.—I dissent. In the proceeding in mandate the trial court ruled sections 3060 and 3066 of the Vehicle Code are violative of due process of law "because four of the nine members of the Board are, by statute, ... new car dealers, who may reasonably be expected to be antagonistic to franchisors such as American Motors." The majority, in sustaining the trial court, asserts "the objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." Further, the majority states: "The State may not establish an adjudicatory tribunal so constituted as to slant its judicial attitude in favor of one class of litigants over another." Following this observation to its logical conclusion the presence on the board of one dealer would be violative of due process of law. This conclusion is flawed in a number of respects. It is sheer speculation to conclude, absent a finding of actual bias, that a dealer-member has a pecuniary interest antagonistic to the manufacturer in disputes between dealer and manufacturer. It

is more reasonable to conclude that a dealer-member would "slant its judicial attitude" against a competitive dealer.

I am in agreement with the holding in *Rite Aid Corp. v. Bd. of Pharmacy of State of N.J.* (D.N.J. 1976) 421 F. Supp. 1161. There a pharmacy chain store system sought to declare unconstitutional and to enjoin the enforcement of certain New Jersey statutes regulating the practice of pharmacy. The pertinent state law provides memberships in the Board of Pharmacy shall consist of five members who shall be registered pharmacists actually engaged in conducting a pharmacy and who shall continue in the practice of pharmacy during the term of his office.

Rite Aid contended the statute facially unconstitutional because it requires that pharmacists regulate their business competitors and is unconstitutional as applied to Rite Aid and chain stores in general as independent pharmacists are required to regulate chain store pharmacies. (The court found Rite Aid's constitutional claims to be without merit.)

Thus, argued Rite Aid, the board members are necessarily biased and can neither be impartial in their regulatory functions nor in adjudicating alleged violations of the Pharmacy Act by Rite Aid and other non Board-member pharmacists.

The court took notice of *Tumey v. Ohio* (1927) 273 U.S. 510 [71 L.Ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243], relied upon by the majority here as a "landmark case on due process limitations upon such pecuniary conflicts of interest," and noted in *Rite Aid, supra*, 421 F.Supp. pages 1169-1170:

"It is fundamental that one accused of violating the law is entitled to a fair trial in a fair tribunal. *Tumey v. Ohio*,

273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). In achieving that standard we have sought to prevent not only actual bias, but also the appearance of bias. *In re Murchison, supra* at 136, 75 S.Ct. 623. To this end, the Supreme Court has stated that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused, deprives the latter due process of law.' *Tumey v Ohio, supra*, 273 U.S. at 532, 47 S.Ct. at 444. It is clear that where the adjudicator has a substantial pecuniary interest in the outcome, the probability of actual bias is too high to be constitutionally tolerable. *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L. Ed.2d 488 (1973).

"We do not believe that the Board, consisting as it does of five pharmacists and two lay persons as required by N.J.S.A. 45:14-1, creates a situation of probable bias in the regulation of pharmacists. The claim made by Rite Aid is similar to the argument advanced by the plaintiff in *Kachian v. Optometry Examining Board*, 44 Wis.2d 1, 170 N.W.2d 743, 747-48 (1969). In this argument Rite Aid is not claiming actual bias but rather contends that '. . . there is an inbuilt, inescapable even if indirect, financial interest involved when [a pharmacist] board member sits in judgment on a fellow-[pharmacist].' *Kachian*, 170 N.W.2d at 747-48.

"Admittedly, the practice and conduct of a retail pharmacy primarily involves commercial activity in which various retail pharmacies compete for customers. Cf. *Virginia*

State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). However, mere theoretical competition alone has never been a sufficient predicate for an inductive conclusion of probable economic bias. *Apoian v. State*, 235 N.W. 2d 641 (S.D. 1975); *Blanchard v. Michigan State Bd. of Exam. in Optometry*, 40 Mich.App. 320, 198 N.W.2d 804 (1972); *Kachian v. Optometry Examining Board*, *supra*.

"Rite Aid, however, argues that *Gibson v. Berryhill*, *supra*, and *Wall v. American Optometric Association, Inc.*, 379 F.Supp. 175 (N.D.Ga.) (3 judge dist. ct.) aff'd mem. 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974), support its facial attack on the N.J.S.A. 45:14-1. We cannot agree.

"*Gibson v. Berryhill* involved a disciplinary proceeding against a non-self-employed optometrist who was not, and could not become a member of the Alabama Optometric Association. The disciplinary proceeding was conducted by the Alabama Board of Optometry whose members were limited by statute to members of the Association, which itself, limited its members to self employed optometrists. Thus, out of Alabama's 192 practicing optometrists, only the 100 Association members were eligible for appointment to the Board. On that record, the Supreme Court agreed 'that the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which [the] case arose.' 411 U.S. at 579, 93 S.Ct. at 1698.

"In *Wall v. American Optometric Association, Inc.*, *supra*, the members of the Georgia State Board of Examiners in Optometry were traditionally chosen by the

governor from among the members of the Georgia Optometric Association, a private organization which was composed of 'dispensing' as contrasted with 'prescribing optometrists. Thus, out of Georgia's 300 optometrists, only the 200 members of the Association were eligible for appointment to the Board which regulated the practice of optometry. In this circumstance, the district court found that the board members had a substantial pecuniary interest and hence could not be 'called disinterested in the outcome of plaintiffs' license revocating proceedings.' 379 F.Supp. at 189.

"It is clear that both *Gibson* and *Wall* involve constitutional attacks addressed not to the face of the statutes involved, but rather to the manner in which they were applied. In neither case did the courts rest their holdings on the fact that mere board membership of individuals in the identical profession as those to be regulated, created a temptation to be biased.

"There is nothing that appears on the face of N.J.S.A. 45:14-1 to indicate the presence of that kind of substantial pecuniary interest which was found to disqualify board members in *Gibson* and *Wall*. As in *Gibson* and *Wall*, to determine if such an interest exists, we must look to more than the mere words of the statute. Evidence is required. Recognizing that the plaintiffs here attack the statute on both facial and 'as applied' grounds, we therefore ordered the taking of evidence to afford the plaintiffs an opportunity to prove, if they could, the existence of the required substantial pecuniary interest. We treat with that argument *infra*.

"In connection with the instant facial attack, however, we have been shown no basis for us to require the disqualification of board members just by reason of their sharing the same profession as plaintiffs. Nor have we been shown any authority which holds that, as a matter of law, mere self regulation of a profession without more, violates due process. We decline to so hold and therefore reject Rite Aid's facial argument." (Fns. omitted.)

In *Hortonville Dist. v. Hortonville Ed. Assn.* (1976) 426 U.S. 482, 491 [49 L.Ed.2d 1, 8, 96 S.Ct. —], the Supreme Court has recently reiterated general language about due process and disqualifying bias in one case cannot reliably be applied to another case without further analysis: "We must focus more clearly on first, the nature of the bias respondents attribute to the Board, and second, the nature of the interest at stake in this case."

The board contends in its closing brief that: "As expressed in a recent law review article: 'An analysis of the circumstances which permit conclusive presumptions of invalidity [because of the possibility of bias on the part of the decision-maker] indicates that it is the *degree* of monetary benefit accruing to the decision maker, or the *degree* of prejudgment, or the *degree* of previously formulated hostility or animosity which determines whether the decision is to be disregarded because of bias.' *F. Davis, Withrow v. Larkin* and the '*Separation of Functions*' *Concept in State Administrative Proceedings*, 27 Ad.L.Rev. 407, 409 (1975). Emphasis in original; footnotes deleted, brackets supplied."

In commenting upon the situation where there is a dealer and manufacturer dispute the majority points to the mandated dealer-board members, and the lack of counter

balance in mandated manufacturer members. We must note on this point the appendix A to appellant's opening brief, a declaration concerning the drafting, negotiations and movement of the legislation creating the board. It declares: [¶] "One of the major issues . . . before successful passage was the question of adding manufacturer's representatives on the . . . Board." This was declined by their representatives allegedly because it would create potential antitrust liabilities. Thus the majority's claim that "The evil here lies in the state's insistence that under all circumstances the adjudicatory deck of cards be stacked in favor of car dealers" is negated. In this dissent I stress the importance of having members on the board with the expertise to understand all aspects of each case before it. Sans such members a board can become an ineffectual group directed in its deliberations and decisions by an executive officer or consultant.

I cannot accept the judgment of the majority which is predicated on an unfounded assumption of "antagonism" by the board toward manufacturers. The dealer-members have not been shown to possess a pecuniary interest which would bias them under any judicially accepted test. It has not been established that the board is not an impartial tribunal for franchise termination protests.

I would reverse the judgment.

SEE COMPANION CASE